88-1521

No. _____

Supreme Court, U.S.
FILED
MAR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

RICHARD BOOTH . . . . . *Petitioner*

vs.

STATE OF ARKANSAS . . . . . *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

PRISCILLA KAREN POPE
P. O. Box 3423
Fayetteville, Arkansas 72702
(501) 443-3985
Attorney for Petitioner

TREVATHAN PRESS • LITTLE ROCK

68pp

QUESTION PRESENTED

A. DOES THE INSTRUMENTALITY OF A CRIME EXCEPTION EXCUSE THE OFFICERS' FAILURE TO OBTAIN WARRANTS TO SEARCH AN IMPOUNDED VEHICLE ABSENT EXIGENT CIRCUMSTANCES OR SEARCH INCIDENT TO AN ARREST.

TABLE OF CONTENTS

QUESTION PRESENTED i

A. DOES THE INSTRUMENTALITY OF A CRIME EXCEPTION EXCUSE THE OFFICERS' FAILURE TO OBTAIN WARRANTS TO SEARCH AN IMPOUNDED VEHICLE ABSENT EXIGENT CIRCUMSTANCES OR SEARCH INCIDENT TO AN ARREST iii

Table of Authorities Cited iv

I. Opinion Below 2

II. Jurisdiction 2

III. Constitutional Provisions Involved

A. Constitutional Provision—4th Amendment . . 3

B. Constitutional Provision—14th Amendment . . 3

IV. Statement of Facts 4

V. Reasons for Granting the Writ

A. This case provides this Court with an opportunity to delineate the boundaries of the "instrumentality of a crime" exception to the warrant requirement for searching motor vehicles absent exigent circumstances or search incident to an arrest 7

B. The evidence taken from defendant's vehicles without a valid search warrant and absent exigent circumstances should have been suppressed 11

VI. Conclusion 24

TABLE OF AUTHORITIES

Cases:

Burkett v. State, 271 Ark. 150, 607 S.W.2d 399 (1980) 17

Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464 (1974) 9

Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970) 7

Freeman v. State, 258 Ark. 617, 527 S.W.2d 909 (1975) 8

McQueen v. State, 283 Ark. 232, 675 S.W.2d 358 (1984) 18

Scisney v. State, 270 Ark. 610, 605 S.W.2d 451 (1980) 17

Tillman v. State, 271 Ark. 552, 609 S.W.2d 340 (1980) 7

Rules and Statutes

28 U.S.C. §1257 (a)

Ark. Stat. Ann. §§ 41-5104 and 75-901

Ark. R. Crim. P., 10, 12, 13.1, 13.2 and 14

Other Sources

Fourth and Fourteenth Amendments of United States Constitution

No. _____

IN THE

Supreme Court of the United States

October Term, 1988

RICHARD BOOTH . . . . . *Petitioner*

vs.

STATE OF ARKANSAS . . . . . *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, RICHARD BOOTH, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Arkansas Court of Appeals entered in the above entitled cause on January 11, 1989.

I.

Opinion Below

The opinion of the Arkansas Court of Appeals is attached as Appendix A and is reported at 26 Ark. App. 115 (1989). The unreported opinion issued by the Circuit Court of Benton County, Arkansas, is attached as Appendix B. The substituted opinion on denial of rehearing of the Arkansas Court of Appeals is attached as Appendix C and is reported at 26 Ark. App. 115 (1989).

II.

Jurisdiction

The judgment of the Circuit Court of Benton County was filed on February 24, 1987.

The substituted opinion on denial of rehearing of the Arkansas Court of Appeals was filed on January 11, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (a).

III.

Constitutional Provisions Involved

A. The Fourth Amendment of the United States

Constitution provides:

AMENDMENT IV—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. The Fourteenth Amendment of the United States Constitution provides:

AMENDMENT XIV—Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV.
Statement of Facts

In the early morning hours of December 9, 1984, Mark and Marcene Gilliland were killed in a hit and run accident while they were traveling south on State Highway 43 in Arkansas. Tire marks at the scene and paint transfers on the Gilliland vehicle led investigating officers to believe a northbound reddish-orange semi tractor-trailer was the second vehicle involved (Tr. 708-709). The investigating officer estimated the time of the accident as 1:15 a.m.

Witnesses placed defendant, RICHARD BOOTH, in the area the night before the accident driving a semi tractor-trailer, reddish-orange in color and leaving for Kansas between 12:50 and 1:30 a.m. (Tr. 539; 604; 619-620; 721).

Arkansas authorities asked Kansas authorities to locate Richard Booth to see if his vehicle evidenced damage consistent with their findings (Tr. 123). Kansas authorities located Mr. Booth's vehicle and seized it without a warrant (Tr. 126). Arkansas officials searched the vehicle twice and Kansas authorities searched it once while it was impounded without a search warrant ever being issued (Tr. 143; 147; 148). A seizure warrant was issued after first search had already taken place (Tr. 145-146).

Defendant was charged with two counts of

Manslaughter and one count of Leaving the Scene of an Accident Involving Death or Physical Injury in violation of Ark. Stats. Ann. Sec. 41-5104 and 75-901 (Tr. 5; 69).

Defendant moved to suppress all evidence and testimony resulting from the warrantless seizure and searches of defendant's vehicles arguing that his Fourth and Fourteenth Amendment rights had been violated. (Tr. 192, 15-21). Defendant's motion to suppress was overruled by the trial court which found exigent circumstances justified the warrantless searches. (Tr. 22-23 and Appendix B).

Defendant was tried to a jury, found guilty on all counts, and sentenced to ten years imprisonment and Ten Thousand Dollars fine on each Manslaughter count and to six years imprisonment and a Ten Thousand Dollar fine on the Leaving the Scene of an Accident Involving Death count. (Tr. 56).

Petitioner challenged the trial court's denial of his motion to suppress on appeal to the Arkansas Court of Appeals, citing the failure to suppress as a point relied upon for reversal of the trial court, as follows:

I.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS AND OBJECTIONS TO INTRODUCTION OF EVIDENCE TAKEN FROM DEFENDANT'S VEHICLES WITHOUT

A VALID SEARCH WARRANT, WITHOUT REASONABLE CAUSE AND ABSENT EXIGENT CIRCUMSTANCES.
(Appellant's Brief pp. 4, 171)

The Arkansas Court of Appeals affirmed the trial court's ruling, in a case of first impression in Arkansas, by extending the "instrumentality of a crime" exception to warrant requirements to petitioner's motor vehicle (Appendix C).

V.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PROVIDES THIS COURT WITH AN OPPORTUNITY TO DELINEATE THE BOUNDARIES OF THE "INSTRUMENTALITY OF A CRIME" EXCEPTION TO THE WARRANT REQUIREMENT FOR SEARCHING MOTOR VEHICLES ABSENT EXIGENT CIRCUMSTANCES OR SEARCH INCIDENT TO AN ARREST.

The Arkansas Court of Appeals in this case has impermissibly abrogated the warrant requirement for search of an impounded vehicle by extending the "instrumentality of a crime" exception to motor vehicles despite the absence of a search incident to an arrest or exigent circumstances.

In this case of first impression in the State of Arkansas, the Arkansas Court of Appeals applied the "instrumentality" exception to the warrant requirement to the warrantless search of a motor vehicle, thus abrogating the well established rule requiring both probable cause and exigent circumstances to justify the warrantless search of an automobile which has in the past been consistently followed by the United States Supreme Court and the Arkansas appellate courts. *See, e.g., Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975 (1970); *Tillman v. State,* 271 Ark. 552, 604 S.W.2d (1980);

Freeman v. State, 258 Ark. 617, 527 S.W.2d 909 (1975).

In so ruling, this Arkansas Court of Appeals incorrectly applied recent state court opinions extending the exception to motor vehicles since appellant was not arrested prior to or contemporaneously with seizure of his vehicle as would be required by the cases relied upon in the Court's ruling, and also incorrectly stated the propriety of a warrantless search where the vehicle is the evidence or instrumentality of a crime is implicit in several United States Supreme Court decisions.

In order to uphold the warrantless searches of appellant's vehicles in this case, the Arkansas Court of Appeals relied upon the "instrumentality" exception to the search warrant requirement which was recently extended to some vehicle searches in *People v. Griffin*, — Cal.3d —, 761 P.2d 103, 25 Cal. Rptr. 643 (1988).

In so ruling this Court erroneously overlooked the significance of the fact that appellant was not arrested on the charges in this case until December 26, 1984, the information having been filed in Arkansas on December 20, 1984 (Tr. 5; Appendix i), even though his vehicle was seized without a warrant on December 9, 1984, some seventeen days **before** defendant was arrested and eleven days before he was charged with any crime, and searched repeatedly without a warrant prior to any charge being filed.

This error is of critical importance because in *Griffin*, and in the cases cited on this issue therein, the Court noted that the vehicles at issue were seized incidental to a lawful arrest of the defendant as evidence of the alleged crime, and later searched. Indeed, it was such a seizure incident to a lawful arrest upon which the Court relied in *Griffin* and in *People v. Teale*, 70 Cal.2d 497, 75 Cal. Rptr. 172, 450 P.2d 564 (1969), also cited by the Arkansas Court of Appeals, in ruling that no search had, in fact, occurred, since the vehicle was itself, evidence, subject to seizure incident to an arrest, *Griffin*, 761 P.2d at 110.

In the present case, no seizure incident to a lawful arrest occurred. Accordingly, the cases relied upon by the Arkansas Court of Appeals have no application to the present case. The United States Supreme Court and Arkansas cases requiring both probable cause and exigent circumstance to justify a warrantless search of a motor vehicle should have been applied to the present facts.

The Arkansas Court of Appeals also misstated the law with regard to motor vehicle search warrant requirements, relying on the reasoning in *Griffin* that the propriety of a warrantless search where the vehicle is the evidence or instrumentality of a crime is implicit in several United States Supreme Court decisions including *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Cooper v. California*, 386

U.S. 58 (1967), and *Carroll v. United States*, 267 U.S. 132 (1925).

Contrary to this Court's assertion, all of these cases recognize and restate the requirement of both probable cause and exigent circumstances before a warrantless search of a vehicle will withstand constitutional attack under the Fourth and Fourteenth Amendments.

Indeed, the trial court's ruling in the present case recognized the requirements of these cases and found, unlike the Arkansas Court of Appeals, that exigent circumstances existed in the present case to justify the warrantless searches of appellant's vehicle, specifically relying upon *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464 (1974), in support of its denial of appellant's motion to suppress (Tr. 23).

Application of the "instrumentality" exception to the warrant requirement for search of appellant's vehicle flies in the face of the United States Supreme Court's constant and continued recognition that a constitutionally protected expectation of privacy in a vehicle exists sufficient to invoke the warrant requirement even when, as in the present case, a vehicle is suspected of itself being evidence of a crime and is impounded. *Cardwell v. Lewis*, supra at 417 U.S. 594, citing *Chambers*, supra, 399 U.S. at 52.

The overextension of the "instrumentality"

exception to the warrant requirement for the search of impounded motor vehicles in *Griffin* and in the present case eviscerates the long-standing Fourth and Fourteenth Amendment warrant requirements previously set out by this Court and should be reviewed by this Court upon grant of petitioner's petition for writ of certiorari.

B. EVIDENCE TAKEN FROM DEFENDANT'S VEHICLES WITHOUT A VALID SEARCH WARRANT AND ABSENT EXIGENT CIRCUMSTANCES SHOULD HAVE BEEN SUPPRESSED.

At the pretrial suppression hearing and at the trial of this case, pursuant to the Fourth and Fourteenth Amendments to the United States Constitution, defendant sought to suppress and have excluded from evidence all photographs, paint and glass samples, test results and testimony resulting from seizure and four searches of defendant's vehicles conducted by Arkansas and Kansas law enforcement officials.

The trial court overruled defendant's motion to suppress stating that the exigency exception to the search warrant applied to the three latter searches, and that the plain view exception applied to the first search, citing *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464 (1974) (Tr. 23). Defendant's objections to introduction of evidence based upon the search and seizure violations presented at the suppression hearing were likewise overruled

during the course of defendant's trial.

The requirements that the state obtain a specific search warrant prior to searching a vehicle and the contents of the warrant are set out in Arkansas Rules of Criminal Procedure 10, 12 and 14. One seizure and four separate searches of Mr. Booth's truck and trailer occurred in the present case. Each search will be discussed separately with regard to the applicable rules and case law.

At the suppression hearing, Trooper Boring and Sheriff Ron Moore, Allen County, Kansas, testified that defendant's truck and trailer were impounded on December 9, 1984, following their viewing of the vehicles allegedly conducted pursuant to the consent of defendant (Tr. 124-126; 141-142). No warrant was obtained for the seizure of defendant's vehicles prior to this impoundment and the state's witnesses did not contend that defendant consented to the impoundment.

From December 9, 1984, through December 21, 1984, it is undisputed that defendant's vehicles remained continuously in the sole and exclusive custody of Kansas police officials (Tr. 142, 148). Special procedures for locking the impound lot at all times were instituted for the duration of the impoundment of Mr. Booth's vehicles (Tr. 142).

On December 11, 1984, commencing at 3:40 and

concluding about an hour later, a warrantless search was conducted by Officer Fogley of the Arkansas State Police (Tr. 165). Trooper Fogley testified he did not obtain a warrant for his search nor obtain the consent of defendant (Tr. 165). Glass samples referred to in the report of Mr. Steve Cox, Arkansas Crime Lab, were taken from the bed of the trailer and numerous photographs were taken by Trooper Fogley during this search (Tr. 165-166). It is not contended that this search was made pursuant to an arrest and Trooper Fogley testified this was not an inventory or safekeeping search pursuant to Rule 12(6)(b), nor was there any exigency such as those enumerated in Rule 14.1 preventing him from obtaining a warrant prior to his search (Tr. 166).

On December 11, 1984, at approximately 5:40 p.m., a warrant was issued to Sheriff Moore directing him to search the fenced lot of the Kansas Department of Transportation and seize defendant's tractor and trailer (Def. Ex. 1) (Tr. 100-101, 145). The tractor and trailer were already impounded on the lot of the Kansas Department of Transportation at the time this warrant was issued (Tr. 143-144). Sheriff Moore testified he sought the warrant because defendant's attorney had requested return of the vehicle and said he would file a civil suit for its return and Sheriff Moore wanted to ensure that he could continue to hold the vehicle until it could be delivered to Arkansas authorities (Tr. 144-415). Sheriff Moore's purpose in obtaining this warrant is also set out in his affidavit in support of issuance of the

warrant. (Defendant's Exhibit 1, page 2) (Tr. 100-101).

Sheriff Moore testified that had he wanted permission to search the vehicle it would be his normal practice to set out with particularity the items sought for. This was not done because he sought and obtained only the authority to continue to hold the vehicles pending resolution of defendant's action to obtain their release (Tr. 155-156).

On December 21, 1984, during a morning hearing on defendant's petition for release of his vehicles, Sheriff Moore was advised by the County Attorney that things were not going well and it looked like the vehicles were going to be released. Prior to 12:00 a.m. on December 21, 1984, Sheriff Moore conducted a search of defendant's vehicles and obtained paint and glass samples listed in Mr. Cox's report from the State Crime Lab and in Sheriff Moore's own evidence custody receipt (Defendant's Exhibit 4, Tr. 156). Sheriff Moore obtained no warrant to search for particular items of evidence in or on defendant's vehicles and did not obtain the consent of defendant for the search. He further testified his search was not intended as one to inventory the contents of the vehicle but was, rather, an investigative search. He further stated there was no reason why he could not have obtained a warrant to search the vehicles during the twelve days they had been impounded (Tr. 155-157).

Subsequent to Sheriff Moore's search of the vehicle

on December 21, 1984, Sheriff Moore returned to his office and found an order from the District Court of Allen County, Kansas, directing him to release defendant's vehicles (Tr. 157). In spite of this order, filed at approximately 11:30, according to Sheriff Moore, he phoned his officer in charge of the impoundment lot and directed him not to release the vehicles to defendant and to continue to hold them until Arkansas Crime Lab personnel arrived and the County Attorney could prepare and file a notice of appeal (Tr. 160-162). Sheriff Moore testified this appeal was dismissed the next day after the fourth search of the vehicles conducted by Trooper Straub and the Arkansas Crime Lab on the evening of December 21, 1984. Mr. Booth's vehicles were returned to him as previously ordered (Tr. 149).

At about 7:10 p.m. on December 21, 1984, according to Sheriff Moore's testimony and his evidence custody receipt, a fourth search of defendant's vehicles was conducted by Arkansas authorities which lasted well into the night. The items seized during this search are set out in the report of Mr. Cox, State Crime Lab (Tr. 172-174), including paint samples taken from underneath the fenderwell and framerail of Mr. Booth's trailer and from the top of the trailer bed, and including and check of the brake system while operating the truck (Tr. 88-89; 175). Numerous photographs were taken by Mr. Page, also of the State Crime Lab, including the interior of the cab of the truck (Tr. 88; 1191-1192).

According to the testimony of Officer Straub and Mr. Cox, no search warrant was obtained prior to this search nor was the consent of the defendant obtained (Tr. 117; 176). Even though Officer Straub purports to have been acting pursuant to the seizure warrant obtained on December 11, 1984, by Sheriff Moore, he concedes that upon his arrival he was made aware by Sheriff Moore that a search of the vehicles had already been conducted, the product of which was delivered to Officer Straub at 7:10 (Tr. 107; 115-116-117). Officer Straub did not testify to any emergency preventing him from obtaining a warrant for his search, stating he relied on the December 11, 1984, warrant. This fourth search of the vehicles was also clearly investigative rather than custodial and the state does not contend otherwise.

The warrant issued to Sheriff Moore was never intended by him to authorize search of defendant's vehicles and thus sets out no particular items to be searched for within or upon defendant's vehicles. To the extent this warrant was relied upon, if at all, by Officer Straub as a search warrant, it is on the face invalid for this absence of particularity as prohibited by Rules 13.1 and 13.2, and also would not support a second search by Arkansas authorities after it had already been executed by Sheriff Moore. Sheriff Moore clearly did not rely on this warrant for his search since he personally obtained the warrant for the sole purpose of holding the vehicles until they could be turned over to Arkansas authorities.

Until the Court of Appeals ruling which is the subject of this petition, Arkansas courts have repeatedly and uniformly held that officers must obtain a warrant prior to searching vehicles within the exclusive control of the police, in the absence of exigent circumstances or consent. *Scisney v. State*, 270 Ark. 610, 605 S.W.2d 451 (1980); *Burkett v. State*, 271 Ark. 150, 607 S.W.2d 399 (1980). This requirement was more recently reaffirmed by implication in *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980), permitting an immediate search of a vehicle on a public highway if the car's contents may never be found again rather than seizing the car and obtaining a warrant, since either course is reasonable. In the present case, defendant's vehicles were already impounded at the time of the last three searches and, accordingly, the exigency exception set out in *Tillman* is inapplicable. Only one reasonable course of action remained, to obtain a search warrant, which was never obtained in this case.

The court in *Tillman* pointed out that in order to justify a warrantless search of an automobile, both probable cause for the search and exigent circumstances must be present, citing *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975 (1970), and *Freeman v. State*, 258 Ark. 617, 527 S.W.2d 909 (1975). Neither is present in the case at bar.

In *Freeman*, the court held that although police had probable cause for seizure of defendant's automobile,

the evidence indicated no exigent circumstances such as to excuse the requirement that a warrant be obtained before the vehicle was seized. The court ruled that use of photographs taken after the warrantless seizure was therefore improper. In so doing the court noted the vehicle, as in the present case, was not seized to protect the public safety or safeguard the owner's property, was not being used for any illegal purpose or for escape, and that the possible connection of the vehicle to the crime was known to the officers when they initially saw it.

As discussed in both *Tillman* and *Freeman*, *Chambers* requires both probable cause and exigent circumstances to justify the warrantless search of an automobile. The heavy reliance placed upon *Chambers* in Arkansas automobile search and seizure cases is particularly important in the present case because *Cardwell v. Lewis*, supra, relied upon by the trial court in support of its order denying defendant's motion to suppress, likewise relies on the *Chambers* decision and quotes that portion of *Chambers* requiring a finding of both probable cause and exigent circumstances before a warrantless search of a vehicle will be found reasonable, as follows:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without

> a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.
>
> . . . The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.
> *Cardwell*, supra, at 417 U.S. 594, citing *Chambers*, 399 U.S. at 52.

The trial court's reliance upon *Cardwell*, supra, in support of its denial of defendant's motion to suppress and objections to admission of evidence and testimony, is also misplaced because that case is distinguishable on its facts.

The court in *Cardwell* ruled evidence of paint scrapings from a car fender admissible, noting that an exigency existed even while the vehicle was in a police parking lot because someone might be instructed to remove the car from the lot and any evidence would be lost. In the present case no such exigency existed. Defendant's truck and trailer were not only taken to a police parking lot but were indeed impounded in a

fenced detention area. Special procedures to keep the enclosure locked and monitored at all times were initiated immediately upon arrival of the Booth vehicles at the impound facility. In addition, all of the witnesses at the suppression hearing testified that there were no exigent circumstances preventing them, had they so desired, from obtaining a warrant prior to any of the the searches of the vehicle. Indeed, the vehicle was in police custody for twelve days, with no search warrant ever being sought by either Kansas or Arkansas authorities despite repeated searches by both. No exigency whatsoever exists or is even asserted in the present case to justify the failure of all authorities involved in the search of defendant's vehicles to obtain a warrant and to specify what they were searching for prior to the search.

Cardwell is also distinguishable from the present case because in *Cardwell*, only visible paint scrapings from the rear fender were taken during the search and no search of the interior of the car occurred. But in the present case, a much more extensive search was undertaken, including taking paint scrapings from the undercarriage and underneath the framerail of the trailer plus glass samples photographed and taken from a position on top of the trailer bed. Further, the interior of the cab was searched, the vehicles were driven and the brakes tested during this process. Evidence from inside the cab included testimony that defendant had a C.B. radio therein (State's Exhibit 58, Tr. 1191-1192). In addition, photographs of the interior and testimony were

introduced at trial to bolster the State's argument that defendant left Mick's Place in Oklahoma without giving his brakes time to fully pressurize, thus causing a screeching sound audible to witnesses within the bar and upon the testimony of the time of defendant's departure was based. Questioning by the State of its witness, Trooper Westgate, which directly addressed the functioning of the interior of defendant's vehicle and operable condition of the brakes was phrased in terms of the possibility of the driver being drunk and reaching over and by mistake or a reason such as being drunk, hitting the wrong brake button inside the cab and dragging the trailer (Tr. 1193).

The trial court's argument, citing *Cardwell*, that the reasonableness of seizing vehicles under exigent circumstances is not foreclosed if a warrant was not obtained at the first practicable moment must fail because no warrant to search defendant's vehicle was ever obtained by any of the officers involved in the searches and no exigency was ever suggested which prevented producing one during the twelve days the vehicles were in the exclusive custody of the police.

The trial court quotes *Cardwell* for the proposition that an exigency may arise at any time and the fact that police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action, noting defendant's attempt to regain his vehicle created an exigency

sufficient to justify the warrantless searches. Certainly this argument has no application to the search by Sergeant Fogley on December 9, 1984, before defendant had even filed a suit for return of his vehicle. Any application of this argument to the searches on December 21st would require a holding by this Court that State authorities are entitled to avoid search warrant requirements when the case is ruled upon the basis of an "exigency" of their own creation. The trial court's suggestion that defendant's actions to regain custody of his own vehicle created an exigency justifying a warrantless search, in spite of intentional police inaction while a suit for return of the vehicle was pending, creates a catch-22 situation in which any and every vehicle could be searched without a warrant so long as the police maintained custody of the vehicle until the owner asked for it back. Surely the Fourth and Fourteenth Amendments protection against unreasonable searches and seizures and the long established exigency requirement cannot be eliminated so easily, particularly where, as here, the so-called exigency was avoided by the authorities who ignored the court order to release the vehicles until they were satisfied all desired warrantless searches had been conducted.

The plain view doctrine has no application in the present case since the initial intrusion was not lawful, the glass and paint samples were not discovered nor taken inadvertently and the incriminating nature of the

evidence, if any, was not immediately apparent, thus giving rise to subsequent testing by the State Crime Lab. *McQueen v. State*, 283 Ark. 232, 675 S.W.2d 358 (1984).

The three warrantless searches of defendant's vehicles conducted by Arkansas and Kansas authorities while his vehicles were impounded clearly constitute a substantial and unreasonable violation of defendant's Fourth and Fourteenth Amendment rights to be free of unreasonable searches and seizures. There was no proof that the evidence obtained during these searches would have been obtained but for the warrantless searches and defendant was severely prejudiced by such evidence in his ability to defend himself in the trial of this case. Defendant's motion to suppress all evidence seized or resulting from these warrantless searches of defendant's vehicles should have been granted, and the trial court's denial of this motion should have been reversed by the Arkansas Court of Appeals.

CONCLUSION

This case presents an important constitutional issue regarding the boundaries of the "instrumentality of a crime" exception to search warrant requirements for motor vehicles. This Court has an opportunity to clarify the limits and boundaries of the "instrumentality" exception with regard to motor vehicles where the search is not conducted incident to an arrest, and no exigent circumstances exist. This case has established a dangerous precedent which, if not clarified, other lower courts might unwisely choose to adopt.

Respectfully submitted,

RICHARD BOOTH, *Petitioner*

By PRISCILLA KAREN POPE
P. O. Box 3423
Fayetteville, Arkansas 72702
(501) 443-3985
Attorney for Petitioner

March 6, 1989

PROOF OF SERVICE

PRISCILLA KAREN POPE, after being sworn, deposes and says that pursuant to Rule 28.3 of this Court she served all parties required to be served with the within PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS by enclosing three (3) copies thereof in an envelope, first class postage prepaid, addressed to:

Mr. Steve Clark
Arkansas Attorney General
201 East Markham
Heritage West Building
Little Rock, Arkansas 72201

and depositing same in the U.S. Mail at Fayetteville, Arkansas, on 10 March 1989.

PRISCILLA KAREN POPE, *Affiant*
P. O. Box 3423
Fayetteville, AR 72702
(501) 443-3985

Subscribed and Sworn to before
me this 7th day of March, 1989.

PATRICIA LINTHICUM
Notary Public in and for
Washington County, State of
Arkansas.